IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

LAND APPEAL NO 45 OF 2023

(Originating from the judgment and decree of the District Land and Housing Tribunal for Kiteto at Kibaya, in Land Application No. 12 of 2020)

MOKIA NJURU .....APPELLANT

VERSUS

CHARLES MAZENGO ..... RESPONDENT

JUDGMENT

7th December, 2023 & 23rd February, 2024

Kahyoza, J.:

Mokia Njuru, the appellant, sued **Charles Mazengo**, the respondent before the district land and housing tribunal (the **tribunal**) claiming for land, the size of which was not specified located at Engusero Sidan village, Laiser Ward within Kiteto District. He lost the claim and appealed to this Court. He alleged in his application that, he acquired the land by clearing the virgin land. He occupied the land in 2002 and in 2004 he applied and obtain permission to clear the bush for farming.

Charles Mazengo, the respondent alleged that, the suit land was part of the land allocated to him by Magugu village (as it then was) and that in

2012 he licenced **Mokia Njuru**, to occupy the disputed land, who later claimed ownership.

The DLHT found in favour of **Charles Mazengo**. Aggrieved, **Mokia Njuru**, appealed to this court. He raised seven grounds of appeal. He opted to argue the first to the fifth grounds of appeal generally and the sixth and seventh separately. Thus, the appeal raised the following issues-

1) Was the tribunal justified to rely on the respondent's evidence?
2) Was the tribunal justified to give credence to the evidence of respondent, who heard the evidence of other witnesses?
3) Did the tribunal err to rely on the documentary evidence admitted against the law ?
4) Did the respondent properly identify his land?
5) Did the appellant prove his title despite having no documents of title?
6) Did the applicant obtain land by adverse possession or was the respondent time barred to assert that he owned the dispute land?

At the hearing, Mr. Jonas advocate represented the appellant whereas Mr. Elias Machibya appeared for the respondent. I will make reference to the submission while replying to the issues raised.

Was the tribunal justified to rely on the respondent's evidence?

The appellant's advocate argued the first and fifth grounds of appeal jointly and the rest separately. He contended that the respondent's evidence

did not establish the size of his land. At page 23 of the proceedings, Dw2 deposed that the respondent was allocated 2000 acres of land as stated in exhibit D.1. Dw2 stated after he surveyed the land he found that the respondent's land was 564 acres. He deposed that that was the only land the respondent owned. Dw4, the respondent, deposed at page 36 of the proceedings that his land was proximately 600 acres. He stated that based on exhibit D1 he had 2000 acres of land. At page 40 of the typed proceedings, the respondent during cross examined, deposed that 564 acres were part of 2000 acres he owned. While being examined by the assessors at page 41, he stated that he cleared 564 acres of land. He added that Exh. D.2 refers to 265 acres of land. Thus, there were major contradictions going to the root of the subject matter. It is not clear as to the size of the land allocated to the respondent.

There is a difference of 1600 acres between the respondent's land, which was determined after survey and the land he claims to own. The fact that the size of the respondent's land was not clearly identified could affect the land adjacent to it owned by other persons, the appellant's advocate submitted.

In addition, the appellant's advocate submitted that, the boundaries are not clear. At page 24 of the proceedings, Dw2 stated that the boundaries

disputed land was not established. The appellant's claim is based on clearing the virgin land, being allocate by the village authorities or adverse possession. He has no ground for his claim. Exh. P. 1 is baseless as it is against the pleadings. It was signed by the village chairman while the pleadings show that it was village environment committee which gave him the permission to clear the bush.

In addition, the exhibit states neither where the land was located nor the size of that land. The appellant did not prove his case. The respondent's advocate cited **Anthony M. Msanga v. Penina (Mama Mgesi) and Another**, Civil Appeal No. 118/2014 (CAT unreported) where the Court of Appeal held that the claimant has a duty to prove his case. The appellant did not prove his case, hence, the tribunal properly dismissed his claim.

He prayed the first ground of appeal to be dismissed.

In his rejoinder, Mr. Yonas, the appellant's advocate, reiterate his submission in chief and cited the **Mandile Kinayo vs Ngoyare Konerei** (PC Civil Appeal 40 of 2020) [2022] TZHC 12162, pg. 8. It is the court's proceedings which show what transpired in court. It is unfortunate that the respondent's advocate did not specify the page of the proceedings, where the appellant stated that he owned 808 acres of land.

At page 5 and 6 of the proceedings, the appellant indicated that he prayed to clear 45 acres of land at first and later applied to clear 58 acres in 2007. The appellant's evidence was supported by Pw2's evidence. Pw2 at page 9 testified that the appellant prayed to clear 45 acres of land and later in 2007 applied for the permit to clear 58 acres in 2008.

He added that exhibit P. 1, was a permit to clear land and not to prove ownership. It is not clear if a person may apply for permit to clear land, which he does not own. Pw1, Pw2, Pw3 and Pw4 proved that he owns the suit land and that he cleared the virgin land. The contention that the appellant had a duty to prove his claim was a misconception. Each party was claiming ownership, thus, each party had a duty to prove his claims, the appellant's advocate submitted. He referred to section 10 of the Evidence Act to support his argument. The respondent failed to establish that he had land in Engusero sidan village so it was wrong for the tribunal hold that the respondent was the lawful owner.

The respondent's advocate did not reply to the issue of contradictions in the respondent's evidence. I submit that there are contradictions which go to the root.

Having heard the rival submissions, the issue is whether the tribunal was justified to rely on the respondent's evidence. I wish to first state the obvious that, the appellant was the claimant before the tribunal, thus, he had the burden to prove his claim. It is trite law in civil proceedings, that a party who alleges anything in his favour also bears the evidential burden and the standard of proof is on the balance of probabilities... See the decision of the Court of Appeal held in **Martin Fredrick Rajab vs Ilemela Municipal Council & Another** (Civil Appeal 197 of 2019) [2022] TZCA 434 (18 July 2022). The Court of Appeal further held that-

> *"It is a cherished principle of law that, generally in civil cases, the burden of proof lies on the person who alleges anything in his favour. This is the genesis of the provisions of section 110 of the Evidence Act [Cap. 6 R.E. 2002] which stipulates as follows-*
>
> *"110 (1) Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts* ***which he asserts must prove that those facts exist****.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person." (Emphasis added)*

Mokia Njuru, the appellant, sued **Charles Mazengo** for trespass, thus, the burden of proof lied him (**Mokia Njuru**) to prove that the disputed land belongs to him and to prove that on balance of probability. I am alive

of the position that in civil proceedings, the burden of proof is not static, it shifts after a plaintiff adduces evidence, to a defendant. The Court of Appeal in **Yusufu Selemani Kimaro v. Administrator General and 2 Others,** Civil Appeal No. 226/ 2020, held that once the plaintiff gave evidence the defendant bears a burden to controvert the plaintiff's evidence. It stated-

> *"Going by the above exposition of the law, it would be insincere if not a misapprehension of the taw on the part of Mr, Halfani to complain as he did that the trial Judge had shifted the onus of proof onto the second respondent.* ***For, in civil cases, the onus of proof does not stand still, rather it keeps on oscillating depending on the evidence led by the parties and a party who wants to win the case is saddled with the duty to ensure that the burden of proof remains within the yard of his adversary.*** *This is so because as per the case of* ***Raghramma v. Chenchamma,*** *A 1964 SC 136, such a shifting of onus is a continuous process in the evaluation of evidence." (Emphasis added)*

The appellant had a duty to lead evidence to discharge his duty to prove the allegation before burden to controvert shifted to the respondent. I am of the considered view that before I find whether the respondent adduced evidence to prove that the disputed land belongs to him, I should find out if the appellant discharged his duty. The appellant's duty was to

prove that the disputed land belongs to him on a balance probability before the burden shifted to the respondent.

The appellant's allegation was that he accrued land through clearing the virgin land in 2002. Later, in 2004 he applied for permission to clear land from the village environment committee, as per his pleadings. The appellant while testifying, stated that he sought the permit to clear 45 acres of land from the village in 2004. Later in 2007 he obtained another permit from the village hamlet [chairman] to clear 58 acres of land. The appellant's evidence did not prove his allegation in the pleadings for several reasons; **one**, the appellant's evidence contradicted his pleadings.

It is trite law that *"a party is bound by his pleadings and can only succeed according to what he has averred in his plaint and proved in evidence; hence he is not allowed to set up a new case"* as it was held in **Makori Wassaga v. Joshua Mwaikambo & Another** [1987] TLR 88.]. The appellant alleged that he obtained permit from the village environment committee in his pleadings whereas his evidence was that, in 2004 he obtained a permit from the "village". It is common knowledge that the village cannot act except through a certain organ or leader. I find that there is therefore no evidence as to who gave him the permit in 2004.

The appellant's evidence was that in 2004, he obtained a permit to clear land from the hamlet chairman. The hamlet chairman is different from the village environment committee as alleged in his pleadings. Thus, the appellant did not lead evidence to prove the allegation in his pleadings.

Two, the appellant's evidence that he obtained permit was not only too weak to establish that he owned the land he cleared, but also, the hamlet chairperson had no mandate under the Environmental Management Act, No. 20 of 2004 to issue such permit. Thus, the appellant did neither prove ownership or prove that he lawfully obtained permit to clear the bush.

Three, the respondent was categorical that the appellant was occupying part of his land, which the village authorities allocated to him in 1994, the allocation, which the District Executive Director approved in 1995. The respondent tendered copies of the minutes. Whereas the appellant's evidence was that he obtained land by occupying and clearing the virgin land.

There is no doubt that land which is not the village land or previously owned, would be acquired through clearing the virgin land. However, after the village is registered, the management of the village land becomes the function of the village council. For that reason, no person can acquire land

by clearing the virgin land in the registered village. Section 8 of the Village Land Act, [Cap. 114 R.E.2019] (**the VLA**) provides that-

> ***"8.**-(1) The village council shall, subject to the provisions of this Act, be responsible for the management of all village land."*

The appellant's claim is self-defeating, he alleged that he occupied the disputed land, which was virgin land in 2002 and in 2004 he applied for permit from the village to clear his land. That evidence proves that the appellant occupied the village land. As the law stood at that time the appellant could not have obtained the village land without involving the village council and the village Assembly as provided by the **VLA.**

Could it be alleged that the appellant occupied the disputed land before the **VLA?** The answer is negative. The **VLA** came into operation in 2021. It is settled that even, before the coming into operation of the **VLA**, once the village was registered the management of the land was vested in the village council. The Court of Appeal demonstrated the function of the village Council in land management in the following cases; **one**, in **National Agricultural and Food Corporation V Mulbadaw Village Council and Others** [1985] TLR 88 and G.N. 168/75, para 5(2) provides as follows-

> *"(2) subject to availability of arable land, the Village Council shall allot a piece of farmland to every kaya in the village according to*

need and ability to develop it. The Village Council shall have power to determine the structural pattern of farms in the village and the use thereof."

Second case, in **Metthuselah Paul Nyagwaswa vs Christopher Mbote Nyirabu** [1985] TLR 103, the Court of Appeal held that there was no transferred because the village council did not approve it. It stated-

"rights to land held in a registered village could only be transferred with the approval of the Village Council... the sale to the appellant, for lack of approval, was void and of no effect."

Arguing by analogy, if the Court of Appeal held that there was no lawful transfer of land in the registered village in the absence village council's approval, I do not hesitate to hold that there would be not lawful occupation of the land without the blessings of the village council in the registered village. Thus, the appellant did not acquire land by tilling the virgin land in the registered village.

Four, the next issue is whether the appellant may argue that since the village did not permit him to occupy the village land, then, he may have acquired it by adverse possession. It is trite law that a public land cannot be acquired by adverse possession notwithstanding the period it is occupied peacefully. Section 38 of the **Law of Limitation Act**, [Cap. 89 R.E. 2019]

stipulates that no person shall acquire public land by adverse possession. It states that-

> *38 (1) Notwithstanding anything contained in this Act-*
>
> *(a) no person shall become entitled to an estate or interest in any public land by adverse possession;*

Section 2 of the Law of Limitation Act, (supra) defines the public land as follows-

> *"public land" means any land which is not held, or deemed by the provisions of the Government Leaseholds (Conversion to Rights of Occupancy) Act to be held, under a right of occupancy, or under customary law, or under the provisions of section 5 of the Customary Leaseholds (Enfranchisement) Act;*

Indisputably, the appellant does not allege that he owned the land under customary law, for that reason it was the public land, hence he could not acquire it by adverse possession.

Five, the appellant had no title to the disputed land as the respondent proved that the village authority had long time allocated him the disputed land. The appellant's contention is that the respondent's evidence was contradictory. I find it proved on a balance of probability and even beyond, that, the respondent was allocated 2000 acres in 1994 and the boundaries were stated in the minutes (Exh. D. 1). According to Dw2, the boundaries of

the land he surveyed were stated in Exh. D. 1, which allocated 2000 acres of land to the respondent.

Dw2 surveyed the respondent's land and found that the size of the respondent's land was 594 acres. I find it established that the survey covered the respondent's land as per the boundaries. There is no evidence that when the village Council allocated land in 1994 used the same method as used by Dw2 in 2017 to obtain the size of land allocated to the respondent. I have doubt if the method Dw2 used to determine and demarcate the respondent's land existed in 1994 and if it existed it had spread to this part of the world.

In addition, it is common knowledge there are different methods of determining the size of land this part of the world. Had the method used in 1994 the same as the method used by Dw2 in 2017 and resulted to different size, then, such evidence would have contradicted each other. However, given the fact the procedure used in 1994 to determine the size of the land was different from procedure or method Dw2 applied in 2017, I cannot hold that the respondent's evidence in respect of the size of land was contradictory.

As to the contention that there is contradictory evidence as to who border the disputed land, for that reason the respondent's evidence is not

credible or he failed to establish the size of his land, I take a position that, the contradictions and the inconsistences are minor, hence, ignorable. The witnesses may have been referring to the different period. Exh. P1 referred to the names of people bordering the land in 1994 which may not be the same persons bordering the land in 2020. Dw2 was precise that the appellant's land was within the respondent's land. It is settled that *minor, immaterial, insignificant or non-critical inconsistencies must not be dwelt upon to deny justice to a party who has substantially discharged his or her burden of persuasion. Where inconsistencies or conflicts in the evidence are clearly reconcilable and there is critical mass of evidence or corroborative evidence on crucial or vital matters, the court would be right to gloss over these inconsistencies." (See the judgment of the Supreme Court of Ghana in* the case of **Effisah V Ansah** [2005-2006] SCGLR 943,).

Six, the appellant cannot successfully contend that he acquired land by adverse possession. The appellant's evidence shows that he started to occupy the disputed land in 2002 and in 2004 he obtained a permit to clear the land. It was more than 19 years in 2020 when the dispute arose. The respondent's advocate submitted that the appellant cannot use the doctrine of adverse possession as a sword.

I am in total agreement with the respondent's advocate that the appellant "*could not sue upon a plea of adverse possession because such a plea cannot be used by a plaintiff as a sword but a shield (defence) when arrayed as a defendant in proceedings initiated against him*". See the holding of the Court of Appeal in **Alex Senkoro & Others vs Eliambuya Lyimo** (Criminal Appeal 16 of 2017) [2021] TZCA 104 (13 April 2021). The Court of Appeal in **Alex Senkoro & Others vs Eliambuya Lyimo**, restated its position in earlier cases of the **Hon. Attorney General v. Mwahezi Mohamed** (*As the Administrator of the Estate of the late Dolly Maria Eustace*) **& Three Others**, [2020] 1 T.L.R 101 [CA] and **Origenes Kasharo Uiso v. Jacuelin Chiza Ndirachuza,** Civil Appeal No. 259 of 2017 (both unreported). In the Court of Appeal in **Hon. Attorney General v. Mwahezi Mohamed** held that-

> ***"No declaration can be sought on the basis of adverse possession in as much as adverse possession can be used as a shield and not as a sword*** .. *The appellant cannot rely on the principle of adverse possession in a case which he is a plaintiff."*

Lastly, there is evidence that the appellant was invited to the disputed land by the respondent. Once an invitee is always an invitee. It is on record that Paulo Mesiki Lukumay (**Dw2**) deposed that the respondent's land was

surveyed following a complaint from Kagahe and Tipula families to the District Executive Director (**DED**). The **DED** formed a team to consider the complaint. They heard parties to the conflict. The respondent produced his documents showing the village had allocated 2000 acres to him in 1994. They surveyed the respondent's land to establish the boundaries and reported to DED. He deposed that during the survey, the appellant was one of people who assisted the respondent to identify the boundaries to the team who were surveying land. He deposed that during the survey they found the appellant's hut (kibanda) within the respondent's land and the respondent told them that he allowed him to occupy that piece of land. He contended that the applicant was not a party the conflict between the respondent and the two families. Yaya Aly (**Dw1**) supported the evidence of Paulo Mesiki Lukumay (**Dw2**) that the appellant was invited to the suit land by the respondent and that after he refused to vacate the respondent reported the matter to him.

I gave credence to the evidence that the appellant was an invitee to the disputed land because the appellant had no plausible explanation on how he acquired the disputed land. Worse still, his witness, Lijiwa Saitoti (**Pw2**) was inconsistent. Lijiwa Saitoti (**Pw2**) deposed that he was a council member in Engusero Sidani village in 1992 and in 1993 the appellant went

to his office and asked for a permit to clear the land. Later, he changed that it was in 2004 when the applicant went to his office to apply for a permit. It was hard to believe his evidence. I am in doubt if, it was true **that each member of the village council** has his own office. Worse still, it is doubtful if member of the village council operates individually on behalf of the village council and whether such acts bind the council. Not only that, but also Lijiwa Saitoti (**Pw2**) contradicted the pleadings. The appellant alleged in his pleading that he obtained a permit from the environmental committee but Lijiwa Saitoti (**Pw2**) deposed that it is his office as a member of the village council, which issued the permit.

It is trite law that once an invitee or lisencee always an invitee or a lisencee. An invitee or a lisencee cannot acquire land by adverse possession whatever the period of time he remained on that land. See the case of the **Registered Trustees of Holy Spirit Sisters T. Vs January Kamili** www.tanzlii.org. [2018] TZCA 32, where the Court of Appeal held by quoting with approval the decision in the Kenya case of **Mbira v Gachuhi** [2002] 1 EA 137 (HCK) that-

> *"The possession had to be adverse in that occupation had to be inconsistent with and in denial of the title of the true owner of the premises;* ***if the occupier's right to occupation was derived***

from the owner in the form of permission or agreement; it was not adverse. *" (Emphasis added)*

I, therefore find that the applicant did not prove that he owns the disputed land to the required standard, to require he respondent to controvert his evidence. Thus, the burden of prove did not shift to the respondent to prove ownership. Even if, the burden of proof shifted to the respondent, I find there is ample evidence that the suit land belongs to the respondent than that it belongs to the applicant, the claimant.

Was the tribunal justified to give credence to the evidence of respondent, who heard the evidence of other witnesses?

The appellant's advocate complained that the respondent heard the evidence of his witnesses before he testified. He argues that Order XVII, rule 1 and 2(1) and (2) of the CPC is provides that that the plaintiff and the defendant have the right to begin. He added that, under Common Law Jurisprudence, a court has discretionary power upon an application or on its own motion to exclude a witness from the court room so that he cannot hear they testimony of other witness. The rationale is to ensure that there is fair trial averting the possibility of the prospective witness from being influenced by the testimony of other witnesses. He contended that respondent heard the evidence of Dw1, Dw2 and Dw3 before he testified.

The respondent's advocate conceded that the respondent heard the evidence of his witnesses before he testified. He submitted the respondent being a party to the suit, he was not required to vacate when his witnesses were testifying. He added that the appellant's advocate did not state how the presence of the respondent in court affected the trial. The law referred to is irreverent.

In his rejoinder, the appellant's advocate submitted that a party to the case has a right to be present but he was required to testify first before his witnesses testified so as not to be influenced by the evidence.

There is no dispute that, the respondent heard the evidence of his witness before he testified. I will not answer the question whether or not he had the right to be present or not but answer the issue whether this court ought to preclude his evidence. There is no law, which prevents a witness to be present when another witness is testifying or which states that if a witness hears the evidence of another, his evidence must be expunged. If the witness heard he evidence of another witness, he may be allowed to testify and his evidence relied upon, unless, the court finds that he was influenced for having listened the evidence of another witness.

In the present case, the respondent was the owner of the land in question. He allied for land to the village authorities. He kept copies of

minutes from village authorities and the office of the District executive director. Dw2 deposed that he surveyed the respondents land to avoid persisting conflicts. I therefore, do not find that the respondent's witnesses testified as to something which was not in the respondent's knowledge to be influenced by his witnesses' testimony. For that reason, I see nothing wrong for the tribunal to received and rely on the evidence of the respondent who heard the testimony of his witnesses.

Did the DLHT err to rely on the documentary evidence admitted against the law?

The appellant's advocate submitted that, the tribunal erred to admit and rely Exh. D1 and Exb. D2, against the section 67(1) (c) and (f) of the Evidence Act, [Cap. 6 R.E. 2022]. Dw2 who tendered Exh. D1, did not state He added that the chairman stated that there was no reason assigned for failure to comply with section 67(1) (c) and (f) of the Evidence Act but still, he admitted the exhibits. He prayed the exhibits to be expunged.

The respondent's advocate replied that the appellant's advocate argument was misconceived as Exh. D.1, was admitted as secondary evidence. He added as regarding Exh. D2, that the tribunal found that the wrong citation was not fatal and proceeded to admit it. He submitted that the tribunal was correct to admit the exhibit.

I examined the record and found that the tribunal admitted the exhibit so it was proper to consider it. It is also settled that irregularities committed during the hearing which do not occasion injustice may be grossed over. See section 45 of the Land Disputes Courts Act, [Cap.212 R.E. 2019].

Did the respondent properly identify his land?

The appellant's advocate submitted that the respondent's pleadings stated that the disputed land was at Emariti village, Magugu ward within Kiteto ward. The appellant's evidence was supported by Pw2, Pw3 and Pw4. Pw3 was the VEO of Emariti village. Pw3 deposed that Pw1, the appellant does not live in Emariti village. Dw1, deposed at page 20 of the proceedings, that the respondent stays on the West side of the appellant's farm. Thus, the appellant resides on the west part of the respondent's farm. From the evidence, there are two different villages. The tribunal's order that the appellant should vacate the land in Engusero sidan village cannot be executed.

Your Lordship, at page 40 of the proceedings, the respondent deposed that he had no land in Engusero Sidan village. It is evident from both sides that the appellant had no land and he does not live in Emariti village. The tribunal's order that the appellant should vacate the land in Emariti is not

cable of being enforced. I pray to Order VII, rule 3 of the CPC, which demands proper description of land which will make the order of the court enforceable.

As to the complaint that the suit land is not located in Emariti as alleged by the respondent, I am of the view that the complaint is baseless. There is evidence from Paulo Mesiki Lukumay (**Dw2**), the land officer, that the disputed land in 1994 was in Magugu village and at that time, Emariti was a hamlet. At the time when he surveyed the disputed land in 2017 the respondent's land was in Emariti village. Paulo Mesiki Lukumay (**Dw2**) is an expert in that field and the appellant's advocate did not cross-examine him regarding the location of the suit land or the respondent's land.

The Court of Appeal has held in cases without number, that failure to cross-examine a witness implies acceptance of the truth of his evidence. The Court of Appeal held in **Kilanya General Suppliers Ltd & Another vs CRDB Bank Ltd & Others** (Civil Appeal No. 1 of 2018) [2021] TZCA 3529 (20 December 2021) that-

> *"It is a principle of evidence established upon prudence in this jurisdiction that failure to cross examine a witness on important matter means acceptance of the truth of the witness evidence."*

The above apart, I examined the appellant's permit to clear Exh. P1 and found that it did not even state where the land was situated. Exh.P.1 was worthless, it depicts that it was issued by the chairman of the village council but a person who issued deposed that he was a member of the village council and not a chairman. Even if, the permit to clear land had any evidential value, the same does not prove that the disputed land was allocated in Engusiro Sidan as stated. The permit reads that it was allocated within on the border of Emirti village. It reads-

> *"...shamba lake ambalo lipo eneo la mpakani na Emarti hivyo asisumubuliwe...."*

The evidence says that disputed land borders both Emarit and Engusero sidan. Basing on the expert evidence Paulo Mesiki Lukumay (**Dw2**), I am of the view that the land was situated in Emarti village as per his evidence.

Did the appellant prove his title despite having no documents of title?

The appellant's advocate submitted that lack of documents is not a ground to deny a person his title to land. Most land in Tanzania are owned under customary tenure governed by customary tenure. In the case of **Kikundi cha Mwanga (Shalilote Kaiza) v. Christina Boniface** tanzlii Media neutral citation, [2020] TZHC 15805 at page 8. The evidence of Pw2,

Pw3 and Pw4 showed that the appellant cleared virgin land in the village of Engusero sidan. Exh.P. 1 showed that the appellant prayed and obtained a permit to clear shamba, to cut trees. Enguserosidan village issued a permit as prayed. It was wrong for the tribunal to declare that the appellant failed to prove his title.

The respondent's advocate replied that it was not true that the tribunal dismissed the suit for the appellant's failure to tender document but because the appellant's evidence as whole was wanting. The tribunal considered the evidence and found it without merit.

The appellant's advocate replied that oral evidence may suffice to prove the case. Documentary evidence is supplement and a substitute of oral evidence.

It is true that oral evidence may be sufficient to prove a fact in issue. Looking at the appellant's evidence as whole, I am not persuaded that the appellant lost the case because he did not have documents, he lost his claim because he did not establish his claim. I will not dwell on this issue as I have already ruled out why the appellant lost his claim. Of course, if the appellant alleged that the village authority allocated him land or permitted him to clear land, he can prove that by document and not otherwise.

Did the applicant obtain land by adverse possession or was the respondent time barred to assert that he owned the dispute land?

The appellant's advocate complained that appellant failed to hold that the appellant who started to occupy the disputed land in 2002 and in 2004 obtained a permit to clear the land, acquired land by adverse possession.

The respondent's advocate replied that the appellant's claim that he acquired title by adverse possession was baseless. He argued that the appellant claims that he acquired the land by adverse possession, implies that the disputed land was the respondent's property and that the respondent defaulted to claim it until time passed. He contended that the doctrine of adverse possession applies as a shield and not a sword. The appellant who was the applicant cannot apply the doctrine of adverse possession in his favour. To support the contention, **AG v. Mwahesi Mohamed (as the administrator of the estate of the late Dori Maria Ute) and 3 Others**, Civil Appeal No. 391/2019 tanzlii [2020] TZCA 27.

The appellant's advocate conceded that, the doctrine of adverse possession cannot be applied as sword but a shield. He submitted that there is a thin line between time limitation and adverse possession. He contended that the appellant had been at the suit land for 17 years.

I will not dwell on this issue as I have already discussed it. In short, the principle of adverse possession cannot be applied in favour of the appellant as he was a claimant. I find that the appellant's claim is baseless.

In the end, find the appeal meritless. I uphold the tribunal's finding that the appellant, who was the claimant, did not prove his claim on the balance of probability. He has not title to the disputed land. Consequently, I dismiss the appeal with costs for want merit and uphold the tribunal's judgment.

I order accordingly.

Dated at **Babati** this 23rd day of **February**, 2023.

J. R. Kahyoza

Judge

Court: Judgment delivered in the virtual presence of the appellant's advocate and in the absence of the respondent and his advocate. The respondent's advocate was dully notified.

J. R. Kahyoza
Judge
23/02/2024